

**IN RE: IMPRELIS HERBICIDE MARKETING,
SALES PRACTICES AND PRODUCTS LIABILITY
LITIGATION**

**THIS DOCUMENT APPLIES TO:
ALL ACTIONS**

SEPTEMBER 21, 2017

Richard Rehm appeals the decision of the Imprelis Arborist Panel,¹ claiming that DuPont should have rated 18 trees for removal and replacement after he made a warranty claim. Because the Appeals Panel decision in Dr. Rehm's case was neither arbitrary nor capricious, the Court will affirm their decision and deny Dr. Rehm's appeal.

BACKGROUND

Because the Court has written about the history of this litigation in several opinions, the following summary will be brief.

In the fall of 2010, DuPont introduced Imreliis, a new herbicide designed to selectively kill unwanted weeds without harming non-target vegetation. After widespread reports of damage to non-target vegetation, the Environmental Protection Agency (“EPA”) began investigating Imreliis, leading to lawsuits, a suspension of Imreliis sales, and an EPA order preventing DuPont from selling Imreliis. In September 2011, DuPont started its own Claim Resolution Process to compensate victims of Imreliis damage. Despite this voluntary process, various plaintiffs continued to pursue their lawsuits, alleging consumer fraud/protection act

violations, breach of express and/or implied warranty, negligence, strict products liability, nuisance, and trespass claims based on the laws of numerous states. After months of settlement discussions, including mediation, the parties came to a settlement agreement. The details of the settlement relevant to the appeals process will be discussed in greater detail below.

A. The Settlement

The Imprelis Class Action Settlement (“Settlement”) covers three classes of Imprelis Plaintiffs. Among the three settlement classes is a property owner class. That class includes all persons or entities who own or owned property in the United States to which Imprelis was applied from August 31, 2010 through August 21, 2011, as well as all persons who own or owned property adjacent to property to which Imprelis was applied and whose trees showed damage from Imprelis on or before the date of entry of the Preliminary Approval Order, or February 11, 2013. Under the Settlement, property owner class members who filed claims by the claims deadline would receive tree removal (or compensation for tree removal), payments for replacement trees, tree care and maintenance payments, and a 15% payment for incidental damages. The Settlement included a warranty that provided for all benefits but the 15% incidental damages award for Imprelis damage that manifested after the claims period closed but before May 31, 2015.

Section III.C.1.a.xi. sets forth the appeals process for property owner class members who file settlement claims. *See* Docket No.117-2, § III.C.1.a.xi. That provision sets the framework for the “Imprelis Alternative Dispute Resolution Panel,” comprised of three arborists – one chosen by DuPont, one chosen by Interim Co-Lead Counsel and Liaison Counsel, and one chosen by the other two arborists. The Agreement describes the Panel’s role as “review[ing] and determin[ing] appeals from the Settlement Claim Process, and decisions by DuPont relating to

objections submitted in the course of the Imprelis Claim Resolution Process.” The Agreement limits the authority of the Panel to “resolving questions or challenges relating to determinations of: (a) tree ratings; (b) the height, and if applicable, the circumference of trees at issue for valuation and tree care respectively; (c) the number of trees qualifying for compensation from DuPont under the Settlement Claim Process; (d) whether a Class Member has provided adequate Spray Records; (e) warranty coverage; and (f) application of those requirements set forth in Exhibit 19 [outlining the types of symptoms found in Imprelis-injured trees and the types of evidence required for claim consideration].” *Id.* The Agreement also specifies that the Panel members will be subject to the Code of Ethics for Arbitrators in Commercial Disputes and that the evidence they consider must be that presented by the parties. In the context of discussing Panel review, the Agreement states that “Any Party maintains its rights to seek review from the Court.” *Id.* The Agreement does not set forth the standard of review to be applied by the Court in reviewing Panel determinations. The form filed by claimants appealing Panel decisions limits Court review to the record submitted to the Panel.

On February 12, 2013, this Court preliminarily approved the Settlement, and on September 27, 2013, the Court held a Final Fairness Hearing to determine whether the Settlement provided fair, reasonable, and adequate compensation to class members. On October 17, 2013, the Court granted the Class Plaintiffs’ Motion for Final Approval of the Settlement. The Order entering final judgment as to the Settlement states that class members are “permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding asserting any Released Claims, against any Releasee . . . by whatever means, in any local, state, or federal court, or in any agency or other arbitral or other forum” February

5, 2014 Order, Docket No. 274, ¶ 7. The Court also retained exclusive jurisdiction over any action relating to the Settlement:

Without affecting the finality of this Order, the Court shall retain jurisdiction over the implementation, enforcement, and performance of the Settlement Agreement, and shall have exclusive jurisdiction over any suit, action, motion, proceeding, or dispute arising out of or relating to the Settlement Agreement or the applicability of the Settlement Agreement that cannot be resolved by negotiation and agreement by Plaintiffs and DuPont.

Id. at ¶ 11.

B. *Richard Rehm's Appeal*

Dr. Rehm reported Impreliis damage to several trees on his property and accepted a claims resolution agreement providing for the removal and replacement of 16 trees and tree care for an additional 18. He later filed a warranty claim, asserting that the 18 trees marked for care had deteriorated to the point where they qualified for removal and replacement. A DuPont arborist inspected Dr. Rehm's property in September, 2014 and concluded that the trees had not significantly worsened in condition. DuPont then denied the warranty claim. Dr. Rehm objected to the denial, but he did not provide additional evidence in support of his objection. DuPont denied the objection, and Dr. Rehm appealed to the Arborist Panel. With his appeal, he submitted 9 photographs and a letter from his lawn care operator discussing the condition of some of the 18 trees at issue. The Arborist Panel denied the appeal.

LEGAL STANDARD

DuPont urged the Court to adopt the standard of review used for arbitration, meaning that the Arborist Panel's fact finding should only be displaced when "there was evident partiality or corruption in the arbitrators," where the arbitrators "refus[ed] to hear evidence pertinent and material to the controversy," or "where the arbitrators exceeded their powers." *See* 9 U.S.C. § 10. Courts have described this standard as making arbitration decisions "substantially

unreviewable.” See *Del. Dept. of Health & Social Servs., Div. for Visually Impaired v. U.S. Dept. of Educ.*, 772 F.2d 1123, 1128 (3d Cir. 1985). Many of the appellants, by contrast, either implicitly or explicitly expect *de novo* review.

The Settlement Agreement is silent on this issue. The Court will chart a middle course. On the one hand, DuPont is correct that deference is due to the Arborist Panel’s expertise, particularly because the panel was assembled in a fashion intended to be neutral, with each party choosing one arborist and those two arborists selecting a third, and because the Arborist Panel clearly was intended to provide an alternative dispute resolution mechanism to streamline the appeals process, save all parties time and money, and reach resolutions as swiftly as possible. On the other hand, the parties carefully crafted the Settlement Agreement and yet still failed to include any explicit guidance to class members or to the Court regarding a standard of review, thereby giving class members no direct notice of what they would encounter at this level of review. This is an especially frustrating failure given the unique nature of this settlement. Indeed, a search of other multidistrict litigation and class action practice has yielded little helpful guidance or authority.

Taking this middle course, the Court will apply an “arbitrary and capricious” standard of review. See *Del. Dept. of Health & Human Servs.*, 772 F.2d at 1128 (distinguishing standard of review under the Federal Arbitration Act from “arbitrary and capricious” standard); *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 268 (7th Cir. 2006) (contrasting “arbitrary and capricious” standard with standard applied in review of arbitration award). That is, factual findings and conclusions drawn by the Arborist Panel will be set aside only if they are “without reason, unsupported by substantial evidence or erroneous as a matter of law.” See *Miller v. Am. Airlines, Inc.*, 632 F.3d 837, 845 (3d Cir. 2011) (internal quotations omitted). Such a standard gives effect

to the parties' clear intent that the Arborist Panel's role be more than merely advisory and recognizes their expertise and neutrality, while still giving class members an opportunity for a more meaningful review of the Panel's decisions.

DISCUSSION

As an initial matter, the Court notes that Dr. Rehm submitted several photographs and articles with his appeal to this Court that were not submitted to the Arborist Panel. The role of the Court in this appeal is to review the decision of the Arborist Panel based on the record before it, and therefore the newly submitted photographs and documents will not be considered here.


Dr. Rehm contends that 18 of his Imprelis-damaged trees have significantly worsened, such that they should be removed and replaced. However, the evidence he submitted in support of his claim gave the Arborist Panel virtually no reason to overturn DuPont's warranty decision. The pictures do not show the trees in sufficient detail to determine a cause of damage, and Dr. Rehm's lawn care operator's letter, which states that certain trees are dead and/or hazards, does not include any evidence or reasoning to support those conclusions. The Court, therefore, cannot conclude that the Panel's decision was arbitrary or capricious and will therefore deny the appeal.²

² Dr. Rehm points out that the Arborist Panel made a factual error in stating that the damage to the trees was first seen in early 2014. This misunderstanding appears to come from DuPont's warranty inspection report, which includes a column for the arborist to note when "new damage" was observed. The notation in the column on the form for Dr. Rehm's property states "early 2014." The inspector likely intended to note that *additional* damage was observed in early 2014, not brand new damage. This error, however, does not affect the outcome here, as it does not change the fact that Dr. Rehm did not submit sufficient evidence to the Panel to support his claim of worsening Imprelis damage.

CONCLUSION

For the foregoing reasons, the Court will affirm the Arborist Panel decision and deny the Dr. Rehm's appeal. An appropriate order follows.

BY THE COURT:



GENE E.K. PRATTER
United States District Judge